exploration permit. *Id.* Therefore, there is no active conduct on the part of Petitioner to satisfy the requirement of the word "addition" as intended by Congress in Section 402 of the CWA.

The Tenth Circuit ignored the requirements of the term "addition" when it found that, "[a]lthough we agree the term 'addition' implies affirmative conduct, such a requirement is satisfied by the *contemporaneous introduction* of polluted water from El Paso's property, through a point source owned and maintained by El Paso, to a navigable stream, Cripple Creek." *Sierra Club v. El Paso Gold Mines*, 421 F.3d 1133, 1144 (10th Cir. 2005) (emphasis added). This statement is a non sequitur; if one has never "added" then one has never "contemporaneously introduced." The Tenth Circuit cannot find a way around the requirement of an "addition" by simply choosing different terminology. This cannot be done specifically where the new terminology requires the same as the old. Both words require an affirmative act, as made clear by their plain meaning. The "ordinary meaning" of the word "addition" is "the *act* or *process* of adding." *Merriam-Webster*, *supra* (emphasis added). The "ordinary meaning" of the word "introduction" is "the *act* or *process* of introducing." *Id.* (emphasis added). The Tenth Circuit failed in concluding that an "addition" is satisfied by a "contemporaneous introduction" where Petitioner has never added or introduced anything into their property.

B. The Tenth Circuit Failed To Follow The Presumption That Identical Words Used In Different Parts Of The Same Statute Are Intended To Have The Same Meaning.

The conclusion that only "active conduct" triggers the permit requirement in Section 402 is supported by cases interpreting the language of Section 404. In *Froebel v. Myer*, 217 F.3d 928, 938-39 (7th Cir. 2000), *cert. denied*, 531 U.S. 1075 (2001), the Seventh Circuit held that "active conduct" is required to trigger the permit requirement in Section 404. In that case, the plaintiff brought a citizen suit, under Section 404, against both the State of Wisconsin and Waukesha County, Wisconsin, after the State had removed a dam from the Oconomowoc River. *Id.* at 930-31. The plaintiff alleged that the removal of the dam effectuated an unpermitted "discharge of dredged or fill material" because water passing through the opening where the dam was located was "scouring" the sediment from the bottom of the river and depositing that sediment downstream. *Id.* at 938. Although the County had not participated in the dam removal, the plaintiff sought to establish liability against the County based on the County's ownership of the property where the dam was located and where the "scouring" took place. *Id.* at 932.

In rejecting the plaintiff's attempt to impose liability on a passive property owner, the Seventh Circuit recognized that the terms "addition" and "redeposit," in the definitions of "discharge of dredged material" and "discharge of fill material," "strongly suggest that a Section 404 permit is required only when the party allegedly needing a permit *takes some action*, rather than doing nothing whatsoever [. . .]" *Id.* at 938 (emphasis added). As a result, the Seventh Circuit ruled:

> Section 404, its underlying regulations, and cases applying its terms all have a common element that is lacking in [the plaintiffs] claims against Waukesha County – *active conduct* that results in the discharge of dredged or fill material. If the county were to pile silt on the riverbank and deliberately allow rainfall to wash it into the stream, then Section 404 might become relevant. Here, however, [the plaintiff's] claim would essentially require Waukesha County to seek a permit to do nothing but continue to own the land. As even [the plaintiff] conceded at oral argument, that cannot be a correct interpretation of Section 404.

Id. at 939 (emphasis added).

If the term "discharge" in Section 404 requires "active conduct," then that term must be given the same meaning in Section 402 because the same word ("addition") is used to define "discharge" in both sections. The Tenth Circuit failed to follow U.S. Supreme Court precedent when it refused to consistently interpret identical language in Sections 402 and 404 of the CWA. "[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934); *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Cohen v. de la Cruz*, 523 U.S. 213, 220 (1998). Thus, the Tenth Circuit should have held that Section 402 and 404 both require "active conduct" to trigger the permit requirements.

The conclusion that only "active conduct" triggers the permit requirement in Section 402 is also supported by Section 404 of the CWA. Section 402 provides that "the

Administrator may [. . .], issue a permit for the *discharge* of any pollutant [. . .]." 33 U.S.C. § 1342(a)(1) (emphasis added). Section 404 provides that "[t]he Secretary may issue permits, [. . .] for the *discharge* of dredged or fill material into the navigable waters [. . .]." 33 U.S.C. § 1344 (emphasis added).

To aid in interpretation of the CWA, Congress added CWA, Section 502, and defined "discharge," "pollutant," and "discharge of a pollutant." 33 U.S.C. § 1362(16), (6), and (12).[2] From reading Section 502, it is clear that both Sections 402 and 404 define "discharge" as "discharge of a pollutant" since "discharge" is used without qualification in both sections. Furthermore, it is clear that "discharge of a pollutant" in Sections 402 and 404 requires the "addition" of a pollutant, as per Section 502. However, the CWA does not define "addition" and its legislative history is silent on the meaning of this term. *See National Wildlife Federation v. Gorsuch*, 693 F.2d, 156, 175 (D.C. Cir. 1982); *Catskill Mts. Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 493 (2nd Cir. 2001).

The presumption that similar terms in the same statute must be given the same meaning is subject to the

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[2] "The term 'discharge' when used without qualification includes a discharge of a pollutant, and discharge of pollutants." 33 U.S.C. § 1362(16).

"The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

"The term "discharge of a pollutant" [. . .] means any addition of any pollutant to navigable waters from any point source [. . .]." 33 U.S.C. § 1362(12).

exception that similar terms in the same statute may be given different meanings if congressional intent is evident. *Atlantic Cleaners & Dyers, Inc. v. United States*, at 433 ("But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent."), Sections 402 and 404 have similar intents, *i.e.*, to prevent the unpermitted pollution of the nation's water. Furthermore, Sections 402 and 404 share the same definitional section, Section 502. Given these well-established canons of statutory construction, the terms in Sections 402 and 404 should be interpreted consistently.

II. THE TENTH CIRCUIT DECISION CREATES NEW LIABILITY FOR THE FEDERAL GOVERNMENT UNDER THE CLEAN WATER ACT.

A. The Federal Government Owns Property Containing Thousands Of Abandoned Mines Now In Violation Of Section 402 Of The Clean Water Act.

This case merits review by this Court because the outcome affects owners of thousands of abandoned mining sites, including the federal government. CWA liability is triggered where there is a discharge of any pollutant from a point source by any person unless authorized by permit. 33 U.S.C. § 1342. Although the federal government is a passive property owner, not engaged in any affirmative conduct to cause an addition of pollutants to navigable waters, under the Tenth Circuit's interpretation of the CWA, the federal government will be liable for its mere ownership of land.

For purposes of CWA Section 402 liability, "Person" is defined as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body." 33 U.S.C. § 1362(5). Although the federal government is not included on the face of the definition for "Person," the Ninth Circuit Court of Appeals has found criminal liability under the CWA for a federal employee acting within the course and scope of his employment. *United States v. Curtis*, 988 F.2d 946, 949 (9th Cir. 1993). Similarly, the U.S. Supreme Court has found federal civil liability under the CWA and induced federal agencies to comply with court-ordered injunctions to remedy CWA violations. *See United States Dep't of Energy v. Ohio*, 503 U.S. 607, 617-18, 628 (1992) (interpreting 33 U.S.C. § 1323(a) (noting express waiver of sovereign immunity)); *see also City of Jacksonville v. U.S. Dept. of Navy*, 348 F.3d 1307, 1314 (11th Cir. 2003) (holding that a waiver of sovereign immunity for punitive, as opposed to coercive, fines must be "unequivocally expressed in the statutory text").

If the Tenth Circuit's decision is allowed to stand, federal government liability and the concomitant taxpayer expense will be massive. No comprehensive list of abandoned mine sites on federal lands exists. However, a number of government agencies have completed surveys or estimated the number of abandoned mines in existence on federal lands, those abandoned mines on federal lands posing environmental threats, and the cost of cleaning up abandoned mines on federal lands.

In April 1988, the U.S. General Accounting Office ("GAO") estimated that 424,049 acres of federal land were covered by unreclaimed hardrock mines. U.S. Gen. Accounting Office, *Federal Land Management: An*

Assessment of Hardrock Mining Damage, Rep. No. GAO/RCED-88-123-BR at 6 (1988) ("GAO 1988 Report"). Of this total, the GAO estimated that 196,612 acres were abandoned mining operations. *Id.*

The Bureau of Land Management ("BLM"), an agency within the U.S. Department of the Interior ("DOI"), has management responsibility for the greatest number of abandoned mines on federal property. BLM is responsible for 260 million acres of land in the western States with 90 percent of that land being open to hardrock mining. National Research Council, Commission on Geosciences, Environment and Resources, *Hardrock Mining on Federal Lands* 1 (1999). In 1999, BLM estimated that it had from 70,000 to 300,000 abandoned mine sites on its property within fifteen western States. U.S. General Accounting Office, *Superfund: Progress Made by EPA and Other Federal Agencies to Resolve Program Management Issues*, Rep. No. GAO/RCED-99-111 at 36 (1999) ("GAO 1999 Report").

Although the BLM is charged with management of lands containing the largest concentration of abandoned mines on federal lands, a number of other federal agencies are faced with a similar situation. For example, the National Park Service, an agency within the DOI, inventoried approximately 2,500 abandoned mine sites on lands it managed. U.S. General Accounting Office, *Federal Land Management: Information on Efforts to Inventory Abandoned Hard Rock Mines*, Rep. No. GAO/RCED-96-30 at 4 (1996) ("GAO 1996 Report"). The Forest Service has identified approximately 39,000 abandoned mine sites on Forest Service lands. GAO 1999 Report at 30. The Fish and Wildlife Service determined that 240 abandoned mine sites are found in the agency's wildlife refuges. *Id.*

Finally, in response to a Congressional request for information about sites containing hazardous materials on the lands managed by the DOI, the U.S. Geological Survey estimated that approximately 88,000 abandoned mine sites, as of July 1994, could be found on lands managed by agencies within the DOI. GAO 1996 Report at 5. Although the surveying techniques among the agencies and even intra-agency vary greatly, clearly several thousand abandoned mine sites are located on federal lands.

Of these abandoned mine sites on federal lands, many have been identified as posing significant environmental risks. These sites would be directly impacted by the decision in this case. For example, the BLM estimated that of the 70,000-300,000 abandoned mine sites on BLM property, approximately 4-13 percent, or 2,800-39,000, may pose potential risks to human health and the environment. GAO 1999 Report at 36. The Forest Service estimated that approximately 5 percent, or 1,800, of the abandoned mines on its property could be releasing hazardous substances. *Id.* at 30. Although these numbers are estimates, given the large numbers of abandoned mine sites located on lands managed by federal agencies, even a small percentage equates to several thousand sites posing significant risk.

If the Tenth Circuit's holding is allowed to stand, the federal government will potentially have CWA point source liability since it owns the leaky "faucets" and is responsible for its "drips." *Sierra Club v. El Paso Gold Mines*, 421 F.3d 1133, 1145 (10th Cir. 2005). This financial responsibility would be staggering. The Forest Service has estimated a cost of $4.7 billion to reclaim abandoned mine sites on lands within National Forest boundaries. GAO 1996 Report at 9. Of this amount, $2.5 billion would be used to

restore natural resources at 2,500 abandoned mine sites and $2.2 billion would be used to restore water quality and address safety problems at another 22,500 sites. *Id.* Although Congress may conclude that federal agencies have an obligation to reclaim these lands, that conclusion should be made by Congress and not by the Tenth Circuit defining the CWA contrary to Congressional intent.

The DOI has reclaimed 20,000 acres of abandoned mine sites at a cost of $5,000 per acre. *Id.* at 10. In a 1991 report, the DOI used this experience to estimate a cost of $11 billion to reclaim existing abandoned mine sites on federal lands. *Id.* at 10. In a 1996 report, the GAO reported a "worst-case" cost of $4 billion to $35.3 billion to reclaim abandoned mine sites on federal lands. *Id.* at 10. Although these numbers are estimates and better data are needed for a final calculation, based on the vast number of abandoned mine sites and the known dollar amount per acre required for remediation, the cleanup will cost billions of dollars.

B. The Federal Government Is Now Subject To Massive Financial Liability Through Clean Water Act Citizen Suits.

In addition to this new CWA responsibility to ensure that federal agencies, as passive property owners, are not "discharging" any pollutant from a point source without a permit, federal agencies are now open to new and expensive litigation under the citizen suit provision of the CWA. 33 U.S.C. § 1365. The citizen suit provision allows any citizen to commence a civil action for violation of the CWA against "any person," specifically including "(i) the United States, and (ii) any other governmental instrumentality or

agency to the extent permitted by the eleventh amendment to the Constitution." 33 U.S.C. § 1365(a)(1). The federal government is now subject to thousands of additional citizen suits and will be forced to bear not only its own litigation costs, but the costs of litigation, attorney and expert witness fees "to any prevailing or substantially prevailing party, whenever the court determines such an award appropriate." 33 U.S.C. § 1365(d).

CONCLUSION

If the decision of the Tenth Circuit is allowed to stand, the federal government will be funding the litigation arm of numerous environmental groups. In effect, the Tenth Circuit decision creates a perpetual motion machine for environmental groups. These groups will use the fee awards from one suit to challenge the next abandoned mine on federal land as they move from mine to mine on lands governed by the Tenth Circuit's decision.

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